

Description of 2002 Disposition Data

- The cases examined were 7,347 cases disposed in calendar year 2002 (opinion and order). (Thirty-one cases were excluded on the recommendation of the COA that were closed by remand or rehearing and 41 cases were excluded where the reported warehouse period exceeded the filing to disposition period.
- Of the 7,347 cases included for analysis:
 - 54.9% of all cases were disposed in 290 days or less.
 - 59.2% of all cases were disposed in 365 days or less.
 - 68.0% of all cases were disposed in 18 months or less.
 - 32.0% of all cases were over 18 months to dispose
- If the warehouse period defined as the days between the date that the case was ready-for-research to the date that the case was sent to research were eliminated, the filing to disposition time improves significantly. It should be noted that this is a conservative estimate of warehouse since it does not include the time that a case is not active after being sent to research before being assigned or worked on. COA was unable to supply this data at the time they created the database but did count it in their own analysis.
 - 60.7% of all cases would have been disposed in 290 days or less.
 - 71.0% of all cases would have been disposed in 365 days or less.
 - 88.9% of all cases would have been disposed in 18 months or less.
 - 11.1% of all cases would have taken over 18 months to dispose.
 - If an additional 6.1% of all cases (448 cases) were disposed in less than 18 months after removing the warehouse days then 95% of all cases would be disposed within 18 months.
 - Eliminating the warehouse would improve the 95% disposition rate from 32% to 11% or by 65.6% (Calculation method $.32/.11 - 1$).
- Of the included cases (7,347):
 - Disposition Type
 - Order 53.4%
 - Opinion 46.6%
 - Intake Type
 - 39.5% were civil claim of appeal
 - 19.9% were criminal claim of appeal
 - 16.3% were civil application
 - 19.8% were criminal application
 - 4.5% were "other"
- **Cases Over 18 Months to Disposition if Warehouse Removed** Cases which exceed 18 months for time to disposition when warehouse removed were considered independently, as problem cases. (814 cases). The following refers to the 814 cases disposed in 2002 which would have taken over 18 months for disposition even if the warehouse period, before being sent to research, were removed.
 - Disposition Type
 - Order 5.0% (41)
 - Opinion 95.0% (773)

- Intake Type

- 50.6% (412) were civil claim of appeal
- 39.7% (323) were criminal claim of appeal
- 8.1% (66) were civil application
- 0.9% (7) were criminal application
- 0.7 (6) were “other”

- Transcript is over 108 days in 50% of cases
- Transcript is over 200 days in 25% of cases
- Lower court record is beyond 21 days from appellee brief in 40% of cases
- Lower court record is over 43 days from appellee brief in 20% of cases

Distribution of Opinion and Order Cases

By Type of Intake

818 2002 Cases Taking Over 18 Months

		opinion or order		Total
		order	opinion	
type of case at intake	Other	0	6	6
	claim of appeal civil cases	22	390	412
	claim of appeal criminal	14	309	323
	application for leave civil cases	5	61	66
	application for leave criminal cases	0	7	7
Total		41	773	814

814 cases over 18 months – All Cases

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 90% of the cases took over 578 days from filing to disposition)

		filing to disposition days	filing to transcript days	transcript to appellant brief days	appellant brief to appellee brief days	days from ae and at brief complete to lower court record filed
N	Cases with Data	814	702	674	761	768
	Median	708	108	101	62	14
	Minimum	550	0	0	2	-617
	Maximum	1756	987	697	709	601
Percent	90	578	21	42	29	-63
	80	606	47	55	34	-25
	75	617	63	56	35	-16
	70	631	74	67	41	-7
	60	660	92	84	58	8
	50	708	108	101	62	14
	40	781	134	112	63	22
	30	844	169	125	83	31
	25	872	202	138	89	36
	20	901	239	153	91	43
	10	983	374	206	112	65
	05	1029	481	264	174	99

412 cases over 18 months – Civil Claim Cases

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 90% of the cases took over 571 days from filing to disposition)

		filing to disposition days	filing to transcript days	transcript to appellant brief days	appellant brief to appllee brief days	days from ae and at brief complet to lower court record filed
N	Valid	412	345	345	380	383
	Missing	0	67	67	32	29
Median		668	90	84	61	16
Minimum		550	0	0	4	-551
Maximum		1583	987	470	651	325
Percent	90	571	15	40	28	-29
	80	589	29	53	33	-13
	75	602	40	55	34	-6
	70	614	49	56	35	5
	60	643	72	69	49	12
	50	668	90	84	61	16
	40	718	105	91	63	22
	30	824	133	109	63	32
	25	854	145	112	66	36
	20	899	162	119	86	42
	10	983	230	165	91	65
	05	1045	307	224	112	89

a type of case at intake = claim of appeal civil cases

323 cases over 18 months – Criminal Claim

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 90% of the cases took over 578 days from filing to disposition)

		filing to disposition days	filing to transcript days	transcript to appellant brief days	appellant brief to appllee brief days	days from ae and at brief complet to lower court record filed
N	Valid	323	313	281	312	314
	Missing	0	10	42	11	9
Mean		777	205	128	98	-12
Median		757	140	112	73	9
Minimum		550	2	0	2	-617
Maximum		1756	958	697	709	258
Percentiles	90	592	47	42	33	-94
	80	621	84	63	49	-40
	75	638	93	82	56	-32
	70	651	98	88	61	-21
	60	700	113	108	63	-1
	50	757	140	112	73	9
	40	812	193	126	87	21
	30	851	258	143	91	30
	25	883	292	152	96	35
	20	918	333	167	105	41
	10	994	450	207	172	65
	05	1030	519	297	287	94

a type of case at intake = claim of appeal criminal

66 cases over 18 months – Civil Applications

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 90% of the cases took over 579 days from filing to disposition)

		filing to disposition days	filing to transcript days	transcript to appellant brief days	appellant brief to appllee brief days	days from ae and at brief complete to lower court record filed
N	Valid	66	36	39	58	59
	Missing	0	30	27	8	7
Median		775	95	182	35	8
Minimum		550	5	10	6	-519
Maximum		1091	827	439	112	601
Percent	90	579	19	56	26	-269
	80	615	27	67	30	-125
	75	630	33	84	33	-105
	70	652	58	96	34	-49
	60	722	69	152	34	-4
	50	775	95	182	35	8
	40	848	132	197	40	20
	30	869	174	222	59	35
	25	875	204	225	62	37
	20	892	265	233	66	44
	10	937	439	266	91	59
	05	1021	757	369	104	113

a type of case at intake = application for leave civil cases

- **Intake Phase and Post- Intake Phase:** Cases which would have taken over 18 months to dispose after removing the warehouse days tended to be in the post-intake stage longer than the intake stage. Seventy-one percent of all cases (70.7% - 573 cases) were in post-intake longer than intake, 84.1% (345 cases) of civil claims were in post-intake longer, 48.3% (156 cases) of criminal claims were in post-intake longer and 87.7% (57 cases) of civil applications were in post-intake longer.
- 30.0% of cases were in the intake process longer than 1 year
- 65.4% of cases were in the post-intake process longer than 1 year

814 Cases Over 18 Months

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 50% of the cases took over 708 days from filing to disposition, over 289 days in intake and over 424 days in post intake).

		filing to disposition days	intake days	post intake days
N	Valid	814	810	810
	Missing	0	4	4
Median		708	289	424
Minimum		550	67	65
Maximum		1756	1054	1426
Percents	90	578	155	209
	80	606	193	289
	75	617	206	319
	70	631	223	344
	60	660	256	392
	50	708	289	424
	40	781	320	465
	30	844	366	515
	25	872	396	542
	20	901	431	568
	10	983	510	689
	05	1029	589	758

412 Cases Over 18 Months – Civil Claims

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 50% of the cases took over 668 days from filing to disposition, over 232 days in intake and over 460 days in post intake).

		filing to disposition days	intake days	post intake days
N	Valid	412	410	410
	Missing	0	2	2
Median		668	232	460
Minimum		550	67	95
Maximum		1583	906	1023
Percents	90	571	136	289
	80	589	161	351
	75	602	175	375
	70	614	186	396
	60	643	205	427
	50	668	232	460
	40	718	263	494
	30	824	297	533
	25	854	316	556
	20	899	351	594
	10	983	421	718
	05	1045	479	804

a type of case at intake = claim of appeal civil cases

323 Cases Over 18 Months – Criminal Claims

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 50% of the cases took over 708 days from filing to disposition, over 289 days in intake and over 424 days in post intake).

		filing to disposition days	intake days	post intake days
N	Valid	323	323	323
	Missing	0	0	0
Median		757	359	360
Minimum		550	116	65
Maximum		1756	1054	1426
Percents	90	592	222	160
	80	621	258	231
	75	638	284	255
	70	651	298	276
	60	700	330	316
	50	757	359	360
	40	812	401	408
	30	851	464	449
	25	883	481	499
	20	918	508	542
	10	994	588	653
	05	1030	678	722

a type of case at intake = claim of appeal criminal

66 Cases Over 18 Months – Civil Applications

Percent of cases refers to the number of cases taking over a corresponding number of days (for example, 50% of the cases took over 775 days from filing to disposition, over 285 days in intake and over 477 days in post intake).

		filing to disposition days	intake days	post intake days
N	Valid	66	65	65
	Missing	0	1	1
Median		775	285	477
Minimum		550	111	168
Maximum		1091	539	924
Percents	90	579	171	277
	80	615	209	374
	75	630	235	394
	70	652	238	407
	60	722	260	437
	50	775	285	477
	40	848	289	524
	30	869	301	563
	25	875	314	584
	20	892	344	608
	10	937	416	656
	05	1021	501	738

a type of case at intake = application for leave civil cases

Report on the Proposal to Reduce Delay in the Michigan Court of Appeals

prepared by

The State Bar of Michigan's Delay Reduction Task Force

Evelyn C. Tombers, Reporter

I. The Task Force and Its Charge

The State Bar of Michigan's immediate past president, Bruce W. Neckers, formed this task force shortly after the Michigan Court of Appeals Chief Judge William Whitbeck announced his proposal to reduce delay in the Michigan Court of Appeals. In addition to Mr. Neckers, the task force's members include Richard D. Bisio, Co-Chair of the State Bar of Michigan's Civil Procedure and Courts Committee; the Hon. Joseph Farah, Genesee County Circuit Court judge and State Bar of Michigan commissioner; Stuart Friedman, an appellate solo practitioner; Deborah Winfrey Keene, Assistant Defender, State Appellate Defender Office; Timothy K. McMorro, head of the appellate section of the Kent County Prosecutor's Office and past chair of the State Bar of Michigan's Appellate Practice Section; Evelyn C. Tombers, Professor of law at the Thomas M. Cooley Law School and immediate past chair of the State Bar of Michigan's Appellate Practice Section; and Janet Welch, General Counsel, State Bar of Michigan.

The task force's charge was to study the proposed court rule amendments and recommend a position on them to the State Bar's Public Policy, Image and Identity Committee, which may then recommend a position to the State Bar's Board of Commissioners. The proposals, which consist of both proposed court rule amendments and internal operating changes, fall into three major categories: "intake" (the transcript, notice, and briefing stage); "warehouse" (the stage after briefs have been filed but before court staff has prepared the case for hearing); and "decision" (the stage beginning with research and ending with an opinion). The task force strongly supports the laudable goal of reducing delay in the Court of Appeals, and it finds many aspects of the proposals worth pursuing, particularly at the warehouse stage. We commend the court for its attention to this important problem and for the steps it has already undertaken concerning the warehouse stage. The task force is particularly concerned, however, about those provisions of the proposed court rules amendments that would shorten briefing time and eliminate the 28-day stipulation to extend time. For reasons described below, the task force believes that these provisions would not only fail to achieve any significant delay reduction but could actually be counter-productive, adding delay later in the appellate process or reducing quality. The task force has offered several alternative proposals for delay reduction that it feels hold greater promise to streamline the processing of appellate cases, without compromising the quality of representation.

II. Summary of the Task Force's Findings

Time and quality of appellate advocacy are inextricably linked, just as are time and the quality of appellate opinion-writing. As a threshold matter, the task force is very concerned that

the proposed court rule amendments will force the court to sacrifice quality for speed at every level. While some percentage of cases would be able to meet the proposed shortened briefing timetable without sacrifice of quality, the task force believes that the quality of a significant percentage of cases would be seriously compromised by the shortened deadlines. This is particularly true for criminal cases. Criminal defense attorneys, many of whom have especially heavy caseloads, would be likely to find themselves unable to properly investigate many of their clients' claims within the foreshortened deadlines and would be deprived of the availability of extension. And the task force similarly worries that shorter deadlines internal to the court could affect the quality of the opinions the court issues. In short, the task force believes that surrendering quality to speed may result in injustice. Equally importantly, the task force observes that the shorter briefing deadlines would not significantly shorten the overall time to process a case as long as the time a case spends in the Court of Appeals warehouse stage awaiting internal staff analysis and processing is not significantly reduced.¹

The court's warehouse stage is by far the most significant obstacle preventing the court from reaching its goal of deciding 95% of its cases within 18 months of filing the claim of appeal. If the court eliminates its warehouse, it will meet its goal without the necessity of imposing further steps that would have the effect of compromising quality of advocacy and adjudication. In other words, as long as the system allows cases to languish in the warehouse, amending the court rules to shorten briefing time and eliminate stipulated extensions will not address the greatest cause of delay. And if the court does succeed in eliminating the warehouse logjam, curtailment of reasonable briefing times and the elimination of extension flexibility will not be necessary to meet the court's decision goals.

This report contains alternatives to shorter briefing times and elimination of extensions that we feel are far likelier to achieve real delay reduction, without risking quality. They include: energizing the bar as a whole to support increased funding for the Court of Appeals earmarked for reducing the warehouse, including, if need be, increased user fees; increasing the number of panels hearing cases every month; allowing court reporters to charge increased fees and allowing them a premium for filing transcripts before their deadlines; and setting a sliding scale for transcript production based on the length of the hearing or trial.

III. The Delay Problem

The task force concurs with Chief Judge William Whitbeck that delay in deciding cases in the Michigan Court of Appeals has reached unacceptable levels for cases decided by opinion. Court statistics² show that of the approximately 3,100 cases the court decided by opinion in

¹ We recognize that the Court of Appeals has indicated its intent to press for court rule changes only after its Judicial Chambers and Warehouse targets are met, but its current timetable is inconsistent with that intent. The timetable calls for adoption of the court rule changes effective September 1, 2003, but does not anticipate appropriations for research attorneys to meet the warehouse reduction goal before FY 2004. Regardless of the timetable, however, the task force believes that the implementation of the court rule changes concerning briefing times and the 28-day stipulation is undesirable.

²The statistics this report relies on are taken from Chief Judge William Whitbeck's presentation to the State Bar, as well as the Michigan Court of Appeals Delay Reduction Plan Progress Report No. 2. His power point presentation slides (the Delay Reduction Proposal) are attached as Exhibit A. Progress Report No. 2 is attached as Exhibit B.

2001, it took an average of 653 days³ for the cases to get through the court from the time the claim of appeal was filed until the opinion was issued.⁴ Cases decided by order take an average of 120 days to dispose of, and the court finds this time to be “reasonably acceptable.”⁵

Broken down by the stages in the appellate process, a case spent on average 261 days in the “intake” stage for all types of cases disposed of by opinion, 271 days in the “warehouse” stage, 61 days in the “research” stage, and 60 days in the “judicial chambers” stage.⁶ The “intake” stage begins when a party files its claim of appeal. During the intake stage, transcripts are ordered and prepared, the record on appeal is identified, the docketing statement is filed, and the parties prepare and file their briefs. Once the parties have filed their briefs, the “warehouse” stage begins. Here, the briefs are stored at the Court of Appeals, and nothing is done with them. In the “research” stage, the briefs and the record are given to one of the court’s research attorneys, and that attorney prepares a report for the panel of judges to which the case is eventually assigned. Finally, in the “judicial chambers” stage, the case has been argued, and the judge and the judge’s law clerk draft the opinion and circulate it among the other judges on the panel that heard the arguments for concurrence or dissent.

The court has also identified processing times by type of case. Average processing times by case are as follows: for “regular/complex” cases 695 days or 1.9 years; for “summary” cases 534 days or 1.46 years; for “non-expedited” cases 744 days or 2.03 years; for “expedited” cases 351 days or .96 years; and for “custody” or “termination of parental rights” cases 325 days or .89 years.⁷

In sum:

From the injured person forced to wait years for compensation to the executive unable to finalize a business transaction, the impact of delay is acutely felt as bills mount, commercial and personal opportunities diminish, and future plans are placed on hold. A child awaiting adoption, an accused awaiting trial, a crime victim and her family experience all too concretely the anxiety produced by the prolonged uncertainty of the outcome of litigation.⁸

IV. The Plan and the Proposed Court Rules Amendments

Chief Judge Whitbeck recognizes that the plan will not garner support until the court shows that it has reduced delay in judicial chambers and in the warehouse. Accordingly, the

³This is about 21 months or 1.8 years.

⁴Progress Report No. 2, at 2.

⁵*Id.* Delay Reduction Proposal, *supra* n.1 at 2.

⁶Progress Report No. 2, at 2.

⁷Delay Reduction Proposal, *supra* at 15.

⁸Rita M. Novak & Douglas K. Somerlot, Delay on Appeal A Process for Identifying Causes and Cures (American Bar Association, Chicago, Ill. 1990) at 1 (quoted in Delay Reduction Proposal, *supra* n.1 at 6).

delay-reduction plan starts with the judges and other court staff. “[T]he Judges must lead and be perceived to lead.”⁹ The plan proposed three areas in which delay can be reduced: judicial chambers, the warehouse, and intake.

A. Decreasing Delay in Judicial Chambers

As noted earlier, when the Court of Appeals delay reduction program began, an opinion case spent on average 60 days in the judicial-chambers stage. The plan proposed to reduce that time to an average of 49 days by January 1, 2003. In July, August, and September, the court issued opinions in 39 days. To meet the goals, Chief Judge Whitbeck proposed that the judges

- Decide 100% of custody and termination of parental rights cases within 42 days of submission to the panel [current average length in chambers is 43 days; this results in a one-day reduction in overall average];
- Decide 100% of the remaining expedited opinion cases . . . within 49 days of submission to the panel [current average length in chambers is 51 days; results in a two-day reduction in overall average];
- Decide 100% of the summary panel opinion cases within 42 days of submission to the panel [current average length in chambers is 42.3 days; results in 1/3 day reduction in overall average]; and
- Decide 100% of the regular/complex panel opinion cases within 105 days of submission to the panel [current average length in chambers is 120 days; results in a 15-day reduction in overall average].¹⁰

B. Decreasing Delay In the Warehouse

Again, a case currently spent an average of 271 days (or almost 9 months) in the warehouse.¹¹ The task force hypothesizes that the warehousing problem most likely stems from the layoffs of research attorneys. The plan proposes to reduce this to an average of 212 days (or 7 months) by September 30, 2003. Under the plan, the court intends to

- Couple summary case call panels with complex case call panels [results in a four-day reduction in overall average];
- Add additional volunteer summary panels [results in a nine-day reduction in overall average];
- Increase the aggregate case day evaluations for complex case call panels [results in a five-day reduction in overall average];
- Continue to assign one summary disposition appeal to each judge on each regular case

⁹Delay Reduction Proposal, *supra* n. 1, at 16.

¹⁰*Id.* at 17-18.

¹¹ For the period of January-June 2002, that average time was reduced to 247 days, and for July –September, to 229. Progress Report

call panel without a research report or a draft opinion [results in a 16-day reduction in overall average];

- Assign one criminal appeal to each judge on each regular case call panel without a research report or draft opinion [results in a 16-day reduction in overall average]; and
- Prepare only draft opinions, and not reports, in certain criminal appeals [results in a four-day reduction in overall average].¹²

The initial plan to reduce delay in the warehouse, however, does not eliminate the warehouse entirely. A case would still spend an average of 212 days in storage at the Court of Appeals until a research attorney, or other court staff, starts to work with it. And because the court did not report existing average days for the categories it reported for reducing warehouse delay, it is difficult to determine if this actually does result in the 20% decrease in time spent in the warehouse the court has projected.

C. Decreasing Delay at Intake

A case spends almost as much time in intake as it does in the warehouse: 261 days (or almost nine months). The time a case spends in intake is attributable to the court reporters, the parties, and the court rules. None of this time is attributable to the court, and the court should probably not be counting these intake days as part of the delay. Nevertheless, the court intends to shorten briefing times, eliminate stipulations to extend the time for filing briefs, and allow extensions of time only for good cause shown. Specifically, the court has proposed the following amendments to the Michigan Court Rules:

- MCR 7.204(H) – Reduce the time for filing a docketing statement from 28 to 14 days after the appellant files the claim of appeal;
- MCR 7.210(B)(1)(c) – Allow a party to order and file only that portion of the transcript that relates to a court’s decision on a motion for summary disposition in “any action that relates solely to an order granting or denying summary disposition in whole or in part . . .”
- MCR 7.210(B)(1)(c) – Allow the appellee to file “additional portions of the transcripts.”
- MCR 7.210(B)(3)(b)(iii) – Requires a court reporter or recorder to file the transcript in an appeal of a decision on a motion for summary disposition within 42 days after it is ordered. (Current deadline is 91 days.)
- MCR 7.210(G) – Require the trial court to send the record to the Court of Appeals within 14 days after the briefs have been filed. (Current deadline is 21 days.)
- MCR 7.212(A)(1)(a)(iii) – Require appellant to file its brief 42 days (six weeks) after the transcript has been filed. (Current deadline 56 days or eight weeks.)
- MCR 7.212(A)(1)(a)(iii) – Eliminate the 28-day stipulation to extend the time for filing

¹²*Id.* at 19.

the appellant's brief on appeal.

- MCR 7.212(A)(1)(a)(iii) – Allow only the court to grant additional time to file briefs, and then only for good cause shown and for a specific number of days.
- MCR 7.212(A)(2)(a)(ii) – Does not change the time limit for filing the appellee's brief on appeal; this remains at 35 days (five weeks).
- MCR 7.212(A)(2)(a)(ii) – Eliminate the 28-day stipulation to extend the time for filing the appellee's brief on appeal.
- MCR 7.212(A)(2)(a)(ii) – Allow only the court to grant additional time to file briefs, and then only for good cause shown and for a specific number of days.
- MCR 7.212(G) – Reduce the time to file reply briefs from 21 to 14 days after the appellee or cross-appellee has filed its brief.

The court estimates that these amendments will reduce the time any case spends in the intake stage by 101 days. It projects that the time an appeal from a decision on a summary disposition motion spends in intake will be reduced by 140 days.

D. Total Time Saved

According to the plan, if the court rules are amended and if the court implements the other measures it proposes to reduce delay, the time a case spends in the Court of Appeals will be reduced by 24%. Specifically, the current overall average number of days from filing the claim of appeal to the ultimate decision in the opinion case will be reduced from 654 days to 498 days.

Chief Judge Whitbeck's proposal also projects the ultimate delay reduction if the court were to hire ten additional prehearing attorneys in September 2003. With those extra attorneys, the court projects that by September 2004 it could dispose of its opinion cases within about 300 days.

V. Understanding Staff Attorneys' Roles in the Court of Appeals

The Court of Appeals currently employs about 70 staff attorneys.¹³ Of those 70 attorneys, three provide support services, 13 work as commissioners, 16-18 plus one supervisor work as senior research attorneys, 30-33 plus three supervisors work as prehearing attorneys, and one works in the settlement office. The court also uses about 12-13 part-time contract attorneys.¹⁴ Each judge also has one law clerk.

- **Support Services Attorneys** – These attorneys compile the Michigan Appellate Digest, prepare the court's catalog issues ("mini-treatises on issues most frequently raised in the Court of Appeals"), maintain the court's law libraries, and evaluate the cases to determine how long it should take the average prehearing attorney to prepare the

¹³ State of Michigan, Court of Appeals, Research Division Overview at 1, attached as Exhibit C.

¹⁴ *Id.*

prehearing report¹⁵

- **Support Services Attorneys** – These attorneys compile the
- **Commissioners** – These experienced attorneys prepare written reports for the judges in discretionary matters (applications for leave to appeal, interlocutory or late appeals, appeals from some administrative tribunals). They also prepare the reports in summary panel cases (routine appeals that are decided without oral argument).¹⁶
- **Senior Research Attorneys** – These experienced attorneys prepare the written reports to the judges in “longer or more complex cases and in termination of parental rights appeals.”¹⁷
- **Prehearing Attorneys** – These recent law-school graduates are supervised by experienced attorneys. They prepare reports in most of the cases (those that are evaluated at between three and six days) that are submitted to formal case call.¹⁸ Their tenure is limited to a maximum of three years, but many prehearing attorneys leave sooner. Turnover is high in part because prehearing attorneys are often tapped by the judges as law clerks.
- **Contract Attorneys** – These attorneys are former court employees who are not otherwise practicing law. They prepare reports to the court in “routine termination of parental rights appeals.”¹⁹
- **Settlement Attorney** – This experienced attorney works in the court’s settlement office and conducts settlement conferences. The attorney selects the cases that might be appropriate for settlement. Outside facilitators assist this attorney by also conducting settlement conferences.

The research reports that the commissioners, senior research attorneys, and prehearing attorneys prepare contain a comprehensive analysis of not only the facts and the parties’ arguments, but also include statements about where the parties preserved the issue, the standard of review, and a discussion of the applicable law. The reports are objective, but they do contain the attorney’s recommended disposition of the case, and they may contain a proposed opinion.

VI. Support for the Delay Reduction Plan

The task force supports several aspects of the plan. For example, the task force supports the court’s internal delay-reduction initiative. And the task force supports the proposed amendments to the court rules that would

- reduce the amount of time within which to file the docketing statement, MCR 7.204(H);

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.* at 2.

¹⁸*Id.*

¹⁹*Id.*

- allow parties to file only those portions of the transcript dealing with the court's decision on a motion for summary disposition, MCR 7.210(B)(1)(c);
- require court reporters to file the transcript in a summary disposition appeal within 42 days after it has been ordered, MCR 7.210(B)(3)(b)(iii); and
- require the lower court to transmit the record within 14 days after the briefs have been filed, MCR 7.210(G).

Although we all support the court's goal of reducing delay, there are aspects of the plan that the task force actively opposes.

VII. Concerns About the Delay Reduction Plan

A. The Definition of Delay

One of the first concerns task force members voiced was concern about the court's definition of delay. The delay equation should not include the intake time because that time does not affect how long it takes the court to process the case. For example, when parties who are truly adverse can agree that to provide their clients with quality advocacy they need more time to brief the case, that should not be considered delay. And that time should not be attributed to the court. The court should start its clock when all briefs have been filed and the case is ready to go to one of the court's staff attorneys. And by redefining delay, the court cuts 263 days from its delay calculation. A case would spend an average of 391 days from filing of all briefs until decision. This exceeds the court's goal of deciding 95% of its cases within 18 months.

B. Cutting Briefing Times and Eliminating Stipulations to Extend the Time Within Which to File a Brief

The task force members were also concerned that shortening the briefing times and eliminating the ability to stipulate to a 28-day extension of those briefing times will adversely affect all practitioners and the quality of briefing. Appellate attorneys frequently are new to a case; therefore, they review not just that portion of the record relating to the issues on appeal as identified by trial counsel, but also review the entire record to determine if there are other issues for appeal. As a result, the 56-day briefing schedule and the 28-day extension often are necessary to ensure a thorough and accurate review of the record and, thus, quality advocacy. Additionally, stipulated extensions should not be a matter of concern for the court because, by definition, they are done by agreement of the parties. In agreeing to a stipulated extension, the parties have balanced the benefit of the extension against the detriment of the delay and decided in favor of the extension. The court should not remove that decision from the parties.

The stipulation to extend time is also the only area in which an appellate practitioner can sensibly manage his or her own docket. The due dates for briefs depend on the time that the transcript is completed and thus are not within a practitioner's control. Judicious use of extensions may be the only way for a practitioner to balance competing demands on limited time. Eliminating the ability to stipulate will especially hurt the smaller practitioner. The appellate specialist or solo practitioner faces a decrease in income because, for example, that practitioner cannot take the emergency appeal because he or she cannot get an extension on the brief that's immediately due. That practitioner then faces a dilemma: take less work and increase fees, take less work and decrease income, or decrease quality by spending less time in crafting the brief.

Thus, the proposed changes have the potential for an economic impact on both the practitioner and the client.

Shorter briefing schedules and no possibility of a stipulated-to extension cut into the criminal-defense appellate attorney's ability to properly investigate the client's claims and review the record. Unless the Legislature is willing to allocate more funds for SADO, and other appointed appellate counsel, the quality of their representation will diminish. Appointed appellate counsel may stop taking cases at all if they cannot properly represent their clients.

The position of the task force is that amending the court rules to cut briefing times is not only unwise, it is unnecessary. The court has already reduced the intake phase by 32 days. (See progress report 2, p 7, for speculation about what caused this decrease.) Thus none of the proposed changes were needed to achieve a 36% decrease in the intake phase. This shows that there is not a clear understanding of what causes or reduces delay in the intake phase. The uncertainty about what causes delay in the intake phase is an additional reason not to adopt the changes affecting briefing time, particularly in light of the detrimental effect they will have on the quality of advocacy.

The task force does support the changes that would accelerate transcript filing, which the court estimates would reduce the time for all appeals by 10 days, 49 days for summary disposition appeals.

C. Motions to Extend the Time for Filing Briefs

Moreover, the task force is also concerned that motions to extend the time for briefing will effectively increase the court's workload. And those motions would increase the cost of an appeal. Would the court waive fees for this motion under appropriate circumstances?

The task force recognizes that extensions aren't completely eliminated under the plan, but the proposed "good cause" requirement, and Chief Judge Whitbeck's statements that these motions will not be granted liberally, cause the task force to oppose a good cause requirement. Indeed, the text Chief Judge Whitbeck relied on in formulating the delay-reduction plan, *Delay on Appeal*, recognizes:

The court's extension policy creates credibility as long as the court does not require of counsel what it does not require of itself. "[A]n appellate court should realize that if it has long delays in deciding cases after submission, it cannot effectively demand punctuality from counsel and court reporters in readying cases for decision. The court itself should be a model of the dispatch it expects from others."²⁰

D. The Timing of the Proposed Court Rules Amendments

Progress Report No. 2 calls for rule changes to become effective September 1, 2003, provided the Court achieves its Judicial Chambers and Warehouse objectives. The task force

²⁰*Delay on Appeal*, at 81 (quoting Appellate Delay Reduction Committee, Appellate Judges Conference, Standards Relating to Appellate Delay Reduction § 3.51, *Commentary*, at 8.

believes that it makes no sense to even consider the controversial step of cutting briefing times and eliminating extensions except for good cause until the court's warehouse is totally eliminated. If the court no longer needs to warehouse cases, it has cut its delay by an average of 266 days. That cuts the time from filing a case to decision in that case to just over one year. That time period is shorter than the goal the court has set for itself of 95% of the cases decided within 18 months of filing the claim of appeal.

VIII. Alternative Ways to Reduce Delay

Task force members brainstormed other ways to reduce delay in the Court of Appeals. All members agreed that we need to energize the bar as a whole to support increased funding for the Court of Appeals in light of the backlog problem. Particularly in light of the state's current fiscal situation, the Task force recognized that increased funding could come not only from the general fund appropriations, but also from an increase in user fees, including an increase in the circuit court fee for filing a copy of the claim of appeal that would be devoted to funding the appellate courts. What follows are other delay-reducing suggestions with some explanation.

A. Resource Recommendations

- Use the lobbyist for the State Bar to lobby the Legislature for more money for the Court of Appeals. All the sections should work together to increase the Court of Appeals funding to eliminate the warehouse.
- Support appropriate increases in court fees as necessary to finance these additional resources:
 - An increased number of prehearing attorneys.
 - More law clerks to each judge. Each judge should have three law clerks. This should allow cases to come out of the warehouse faster and would decrease the amount of time spent in chambers.
 - A court administrator who functions like court administrators in circuit court. This new position would include organizing and maintaining a system to ensure expeditious flow of work through the court. Because of the varied duties of the Chief Judge and Chief Clerk, they do not have time to devote to the continual monitoring and tweaking necessary to maintain an effective, efficient system.
 - Proper funding for criminal defense appellate services.

B. Operations Recommendations

- Continue to run more panels, and use visiting judges again. Running 14 panels rather than 9 means a 33% increase in panels. This should speed the processing of cases through the court. (The task force recognizes that the court has started to assign more cases per month per panel, and it supports this initiative.)
- Send less complex cases to panels without prehearing reports; increase the number of cases that bypass the prehearing attorneys. (The task force recognizes that the Court of Appeals has already started doing this and supports that initiative.)

- Develop a track system based on docketing statement; screen cases when they're filed rather than after they've been warehoused.
- Conduct better triage of cases – arrange docket by case type. Better screening could put cases on different tracks, which will help avoid mootness issues for criminal defendants and irreparable damage to civil litigants. Have different employees handle different types of cases. For example, less experienced attorneys could handle cases that do not require review of a significant record while more experienced attorneys could handle the box cases.
- Institute a case differentiation management system by having experienced Court of Appeals employees evaluate each file when it is originally submitted to determine its complexity and determine what needs to be done.
- Allow summary affirmance or peremptory reversal by less than a unanimous vote.
- Adopt the mailbox rule for filing documents with the court.

C. Use of Technology Recommendations

- Adopt e-filing. On a short-term basis, consider emailing copies of defect letters, orders, and opinions to litigants.
- Have parties include a disk with the brief on it when filing the brief. This will allow the prehearing attorney to lift passages from the brief when preparing a report.
- Consider increased adoption of telephonic (or video) oral arguments in selected cases or on stipulation of the parties. This will save attorneys time that they can then devote to other work.
- Allow faxing of more than just orders.

D. Transcript Recommendations

- Amend the Michigan Court Rules and Michigan Compiled Laws to allow court reporters to charge a premium rate if they file the transcripts before the deadline.
- Set a sliding scale on transcript production. Reduce the time for shorter trials. The court reporter should have more time for a 20-day trial without having to file numerous motions.
- Amend the Michigan Compiled Laws and the Michigan Court Rules to increase the rate a court reporter may charge, but add sanctions for filing late.
- Move toward requiring real time court reporting. Require court reporters to invest in the technology by a certain date – 2004, for example. Real time transcription saves time required for producing transcripts. Court reporter could submit transcript on disk to appellate attorney and court.
- If the reasons for the decision are contained in a written opinion and order, eliminate the need for transcripts of the motion argument in an appeal from a summary disposition decision, unless there is an evidentiary hearing on the motion.

E. Briefing Recommendations

- Once the warehouse is empty, adopt shorter briefing times for review of simple summary disposition motions and other cases that do not require a review of a trial or lengthy hearing transcript.
- Amend MCR 7.205(C) to allow answers to applications to be in answer form rather than in brief form. This would probably be of more interest in criminal cases, but when there are many answers to file, permitting a short answer rather than a formal brief would be a great time saver.
- Set a reduced briefing schedule when leave has been granted. As it stands now, once leave is granted, the case proceeds on the normal briefing schedule. Presumably, the appellant has already written a brief that addresses the merits of the appeal to get leave granted, and the appellee has done likewise. If that work is already done, why give the parties even longer to do it again? The appellant could opt to waive further briefing time if satisfied with the brief accompanying the application for leave to appeal. Or, if the parties want to supplement the brief that accompanied the application for leave to appeal, it shouldn't take that long to do, and the court could reduce the briefing times.

F. Specific Court Rule Recommendations

- Widen the grounds for summary affirmance and peremptory reversal. Currently, MCR 7.211(C)(3) provides the following grounds for summary affirmance: “it is manifest that the questions ought to be reviewed are so unsubstantial as to need no argument or formal submission” or “the questions sought to be reviewed were not timely or properly raised.”

MCR 7.211(C)(4) allows peremptory reversal if “reversible error is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission.”

The rules could be widened to say that “the dispositive issues are governed by settled law and the panel concludes that oral argument will not significantly assist the court in deciding the appeal.”

- Amend the court rules to require trial counsel to move for a new trial in the trial court and prepare a document that outlines the alleged trial errors that should be reviewed. This could keep a number of cases out of the Court of Appeals because the trial courts could correct the errors. And it would negate time consumed by hearings on remand from the Court of Appeals because a record would already be available for review.
- Change the culture of delay that afflicts every aspect of the appellate system. Until now, judges haven't really recognized the effect delay has on litigants.
- Make delay reports public. The court should release reports that describe the number of cases each judge has, their complexity, and how long the case has been in chambers.

IX. Conclusion

The task force commends Chief Judge Whitbeck and the court's other judges and staff for their willingness to tackle, head on, a problem that has plagued the court for years. Chief Judge Whitbeck is right when he cites the old adage that justice delayed is justice denied. The task force approves of the plan's asking for efficiency and productivity from the court and those who practice before it.

But the court's goals in managing its caseload should be three-fold: the court should strive to be efficient, it should strive to be productive, and it should not sacrifice quality or doing justice in the process.²¹ Unfortunately, some of the court's suggestions for reducing delay come at the expense of quality and justice. Shorter briefing schedules and no extensions mean less time for fact investigation, research, and carefully crafting the argument. The quality of advocacy suffers. Shorter briefing schedules and no extensions also mean sacrificing justice for the criminal defendant whose attorney cannot properly investigate his or her claims or champion the cause.

Therefore, the task force recommends that the State Bar provide active support for the provisions of the Delay Reduction Plan that do not address court rule changes, actively oppose the identified portions of the proposed amendments to the court rules, and actively encourage the consideration and adoption by the Court of Appeals of the additional recommendations of the task force concerning delay reduction.

²¹*Id.* at 81.

APPELLATE COURT PERFORMANCE STANDARDS AND MEASURES



*Appellate Court Performance Standards Commission
and the National Center for State Courts*

The appellate court assigned to issuing an opinion should initially determine whether an opinion will satisfy one or more of the factors enumerated above. Once a court decides that an opinion should be designated as authority, the court should issue an opinion in a form that clearly states the issues, necessary facts, holding, and rationale, including providing a legal analysis of relevant authorities and principles. The manner in which the final decision to publish an opinion as precedential authority is made should be established by court rule.

Appellate court systems should have exclusive control over determining which opinions are considered precedential authority. According precedential value to an opinion is different from dissemination of that opinion. Historically, “publication” of an opinion determined whether it could be cited as authority; however, modern communication techniques such as electronic transmission and unofficial publications have blurred this line. Regardless of how an opinion is disseminated, appellate courts should specifically determine and indicate whether the opinion has precedential authority.

Standard 2.4 Timeliness

Appellate court systems should resolve cases expeditiously.

Commentary

Once an appellate court acquires jurisdiction of a matter, the validity of a lower tribunal’s decision remains in doubt until the appellate court rules. Delay adversely affects litigants. Therefore, an appellate court should assume responsibility for a petition, motion, writ, application, or appeal from the moment it is filed. The appellate court should adopt a comprehensive delay reduction program. This program should be designed to eliminate delay in each of the three stages of the appellate process: record preparation, briefing, and decision making.²

² Rita M. Novak and Douglas K. Somerlot, *Delay on Appeal*. Chicago: American Bar Association, 1990, is an excellent blueprint for assisting

A necessary component of any comprehensive delay reduction program is the adoption of time standards to monitor and promote the progress of an appeal or writ through each of the three stages. Time standards applicable to appellate court cases should be responsive, when appropriate, to the special needs of individual cases when doing so does not sacrifice the quality of appellate justice.

Time standards cannot function without the joint cooperation of lawyers, court staff, and judges. Courts must recognize that a number of factors, including the appellate court's lack of direct supervision over lower tribunals, local legal culture, case complexity, and adequacy of resources for those responsible for processing appeals, have an effect on the time that it takes to resolve cases. These factors must be considered in developing realistic delay-reduction goals for any particular court. Each court should reach consensus concerning guidelines establishing the appropriate number of days that a given percentage of the caseload should take to complete each stage of the appellate process.³

appellate courts in developing and implementing an effective delay reduction program.

³ For example, in the American Bar Association's *Standards Relating to Appellate Courts*, Standard 3.52 suggests a Reference Model for courts of last resort whereby they should resolve 90% of all appeals within one year from the filing of a petition for review or the notice of appeal. Intermediate appellate courts should resolve 95% of all appeals within one year of the filing of the notice of appeal.